Filed 11/30/16 P. v. Alonzo CA2/3
On remand

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GONZALO ALONZO, Defendant and Appellant.	B248995 (Los Angeles County Super. Ct. No. BA321933)

APPEAL from a judgment of the Superior Court of Los Angeles County, Curtis B. Rappe, Judge. Affirmed and remanded with directions.

Alan Siraco, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Mary Sanchez and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Gonzalo Alonzo raises contentions of sentencing error, an improper denial of his motion for a continuance, and ineffective assistance of counsel following his conviction of four counts of premeditated attempted murder, with gang and firearm enhancements. In our initial opinion in this matter (*People v. Alonzo et al.* (Sept. 27, 2012, B217909, B236117, B235942) [nonpub. opn.]) (hereafter, *Alonzo I*), we vacated Alonzo's sentence of 160 years to life because he was 17 years old when he committed these crimes. We remanded to the trial court with directions to resentence Alonzo because of recent changes in Eighth Amendment doctrine regarding the sentencing of juvenile offenders.

On remand, the trial court imposed a sentence of 40 years to life, which we affirmed (*People v. Alonzo* (Jan. 29, 2016; B248995) nonpub. opn. [Edmon, P.J., Aldrich & Lavin, JJ.]) [hereafter, *Alonzo II*].[1] However, review was granted in *Alonzo II* by our Supreme Court on April 20, 2016, with further action deferred pending its decision in *People v. Franklin*, S217699. On August 17, 2016, the Supreme Court transferred *Alonzo II* back to this court with directions to vacate our decision and reconsider the cause in light of *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*).[2]

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[1] We take judicial notice of our unpublished decisions in *Alonzo I* and *Alonzo II*. (Evid. Code, § 452 subd. (d); Cal. Rules of Court, rule 8.1115(b).)

[2] In transferring *Alonzo II* for reconsideration, the Supreme Court specifically directed us to the pages in *Franklin* that discussed the need to remand that case to the trial court for a determination of whether Franklin had been given a sufficient opportunity to put on the record the type of information deemed

For the reasons discussed below, we will affirm Alonzo's sentence but remand the case to the trial court to determine if Alonzo is entitled to a hearing to present evidence relevant to his future youthful offender parole hearing.

BACKGROUND

1. Alonzo's trial.

a. *The aborted plea bargains.*

On the eve of trial in this matter, in early 2009, the defendants and the People negotiated the following plea bargains: Alonzo was to receive a 20-year prison term, and his codefendant Jaime Cabrales was to receive an eight-year term. However, a fairly heated dispute arose as to whether the parties had submitted the proposed plea bargains to the trial court in a timely manner. Defense counsel attempted to convince the trial court that the parties had reasonably understood the court to have merely said it preferred to have any proposed settlement submitted for approval at least one week prior to trial, whereas the trial court maintained it had informed the parties that this was an actual deadline. The trial court refused to consider the proposed plea bargains and the matter went to trial.

Following their convictions, one of the defendants' contentions on appeal was that their convictions had to be reversed because the trial court refused to consider the negotiated plea bargains. The defendants argued the trial court violated their rights by enforcing a general policy—which had never been properly promulgated as a local rule of court—

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relevant to a youthful offender parole hearing by Penal Code sections 3051 and 4801. Neither party elected to file a supplemental brief addressing *Franklin*, as permitted by California Rules of Court, rule 8.200(b).

requiring plea bargains to be completed a week prior to trial. The Attorney General disagreed, arguing that the trial court had not been enforcing a general policy, but rather had merely ordered the parties *in this case* to have any proposed plea bargains submitted for approval by a certain date.

Because the appellate record did not contain reporter's transcripts for several of the crucial pretrial conferences, it would have been difficult on appeal to sort out exactly what transpired. However, we concluded the defendants could not demonstrate any resulting prejudice from the alleged constitutional violations because, as the record made clear, the trial court would have rejected the proposed plea bargains as too lenient even had its submission deadline been met.

b. *Trial evidence.*

We include here an abbreviated statement of the facts underlying Alonzo's convictions, taken from our initial opinion in this matter. Viewed in accordance with the usual rules of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

At about 10:30 p.m. on April 27, 2007, Ricardo Salas, Arturo Torres, Carlos Ocampo and Jose Ocampo were in front of a house on Thomas Street when a gray or white Dodge truck with three occupants passed by. Someone in the truck yelled out, in Spanish, "[W]hat's up, faggots?" The driver leaned back, allowing one of the passengers to point a gun at the four men on the street. Four or five shots were fired. One of the bullets hit Jose in the side and another bullet hit the house. The truck drove off. Jose was treated at a hospital and released.

Los Angeles Police Officer Benjamin Aguilera and his partner happened to be on patrol in the immediate area and

heard the gun go off. They were already driving toward the gunshot sounds when they heard the radio report giving the address of the shooting; they arrived at the scene within a minute. Aguilera testified Salas reported having seen a white or gray pickup truck with an extended cab coming south on Thomas Street, that someone yelled something, and that the truck's front seat passenger extended his arm out and fired a gun. Salas said he ducked for cover and last saw the truck turning left onto Manitou Avenue. The officers broadcast a description of the truck.

Los Angeles Police Officers Jason Smith and Rafael Hernandez were on patrol in the Lincoln Heights neighborhood when they heard the truck description over the radio. Because they knew that some members of the Eastlake gang lived on Thomas Street, the officers thought this incident could be a gang shooting. They drove to 2105 Keith Street, a known hangout of the Lincoln Heights gang, which was a rival of the Eastlake gang. When they arrived, shortly after 10:30 p.m., there was a silver Dodge truck parked on the street, and Smith saw a man sitting on the stairs of 2105 Keith Street. When Smith aimed a spotlight at him, the man ran toward the back of the house. Smith went around to the next street in an attempt to intercept him. In the backyard of an adjacent house, Smith discovered a revolver.

Defendant Alonzo, then 17 years old, was subsequently discovered hiding inside a bedroom at 2105 Keith Street. Codefendant Jaime Cabrales was apprehended on the street around the corner from 2105 Keith Street.

At an in-field show up conducted later that same night, Salas and Torres identified Alonzo as the gunman, and Salas identified Cabrales as the driver. Salas and Torres both

identified the Dodge truck, which was registered to Cabrales. Alonzo's right hand tested positive for gunshot residue. The fingerprints of both Cabrales and Alonzo were found on the truck.

Forensic evidence showed that the revolver recovered by Officer Smith could have shot the bullets that were fired at the victims.

Officer Rick Huerta testified as a gang expert. He had spent three years working as a gang officer in territory controlled by the Lincoln Heights gang. The gang's primary activities included robberies, drug sales and drive-by shootings. Huerta testified Alonzo and Cabrales were members of the Lincoln Heights gang. Huerta opined the shooting had been carried out to benefit the Lincoln Heights gang because it was directed at people in a rival gang's territory.

c. *The initial judgment against Alonzo.*

The jury convicted Alonzo of premeditated attempted murder (four counts), assault with a firearm (four counts), and shooting at an inhabited dwelling (one count), with criminal street gang, arming, great bodily injury, and firearm enhancements (Pen. Code, §§ 664, 187, 245, 246, 186.22, subd. (b), 12022, 12022.7, 12022.53, 12022.55).[3]

The trial court sentenced Alonzo to terms of 40 years to life for each of the four attempted murder convictions (calculated as 15 years to life for attempted murder,[4] plus 25 years to life for the

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[3] All further statutory references are to the Penal Code unless otherwise specified.

[4] Premeditated attempted murder carries a life sentence, with a minimum parole-eligibility period of seven years unless some other provision establishes a greater minimum term. (See *People v. Jefferson* (1999) 21 Cal.4th 86, 97.) The gang

firearm enhancements (§ 12022.53, subd. (d))). The court then ordered Alonzo to serve the four 40-years-to-life terms consecutively, for a total sentence of 160 years to life. The trial court stayed sentencing on all the remaining counts pursuant to section 654's prohibition on multiple punishment for the same act.

d. Alonzo I.

In *Alonzo I*, we rejected Alonzo's claimed trial errors, including his contention that the trial court had erred by refusing to give any consideration to the proposed plea bargain. However, we held that Alonzo's 160-years-to-life sentence violated the Eighth Amendment under recent United States and California Supreme Court case law regarding the sentencing of juvenile offenders to prison terms that prevent any possibility of rehabilitation and eventual release. For that reason, we vacated Alonzo's sentence and remanded his case to the trial court for resentencing.

Upon resentencing, the trial court sentenced Alonzo to an indeterminate prison term of 40 years to life.

CONTENTIONS

Alonzo contends: (1) his Sixth Amendment right to retain counsel of his choice was violated when the trial court refused to grant a continuance; (2) his sentence of 40 years to life violates the Eighth Amendment; and (3) he was denied the effective assistance of counsel at his resentencing hearing.

As directed by our Supreme Court, we hereby vacate our decision in *Alonzo II* and, after reconsideration, issue the

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enhancement statute extends that minimum parole eligibility term to 15 years. (§ 186.22(b)(5).)

following opinion. We again deny contention (1) as meritless. As to contention (2), we deny Alonzo's Eighth Amendment claim that his sentence of 40 years to life violated the Eighth Amendment because that claim has been rendered moot by *Franklin*. As to contention (3), we again find there was no ineffective assistance of counsel at the resentencing hearing, but we will – pursuant to *Franklin* – remand to the trial court so it may determine whether Alonzo was given a sufficient opportunity to put on the record sentencing information relevant to his future youthful offender parole hearing.

DISCUSSION

1. *Trial court did not err by failing to grant continuance for Alonzo to retain counsel.*

Alonzo contends the trial court violated his Sixth Amendment right to counsel when it refused to grant a continuance so that he could pursue retaining private counsel to represent him at the resentencing hearing. There is no merit to this claim.

a. *Legal principles.*

An improper interference with a defendant's right to retain counsel of choice is a structural error requiring reversal of any ensuing conviction. "The Sixth Amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.' We have previously held that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him. [Citations.]" (*United States. v. Gonzalez-Lopez* (2006) 548 U.S. 140, 144 [126 S.Ct. 2557].) "[T]he right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of

counsel was erroneous. No additional showing of prejudice is required to make the violation 'complete.' " (*Id.* at p. 146, fn. omitted.) "Deprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice – which is the right to a particular lawyer regardless of comparative effectiveness – with the right to effective counsel – which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed." (*Id.* at p. 148.) "We have little trouble concluding that erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error." ' [Citation.]" (*Id.* at p. 150.)

"California decisions in this area reflect a determination that respect for the dignity of the individual shall be maintained within the context of enforcing the criminal law, and that a reasonable accommodation of seemingly conflicting values shall thereby be achieved. Thus, though it is clear that a defendant has no *absolute* right to be represented by a particular attorney, still the courts should make all reasonable efforts to ensure that a defendant financially able to retain an attorney of his own choosing can be represented by that attorney. [Citation.] . . . [¶] . . . [T]he state should keep to a necessary minimum its interference with the individual's desire to defend himself in whatever manner he deems best, using any legitimate means within his resources – and that that desire can constitutionally be forced to yield only when it will result in significant prejudice to the defendant himself or in a disruption of the orderly

processes of justice unreasonable under the circumstances of the particular case." (*People v. Crovedi* (1966) 65 Cal.2d 199, 207-208, fns. omitted.) "In other words, we demand of trial courts a 'resourceful diligence directed toward the protection of [the right to counsel] to the fullest extent consistent with effective judicial administration.' [Citation.]" (*People v. Ortiz* (1990) 51 Cal.3d 975, 982-983.)

At the same time, however, the grant or denial of a motion for continuance rests within the sound discretion of the trial court. " 'A continuance in a criminal trial may only be granted for good cause. [Citation.] "The trial court's denial of a motion for continuance is reviewed for abuse of discretion." [Citation.] "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." [Citations.]' [Citation.] 'The party challenging a ruling on a continuance bears the burden of establishing an abuse of discretion, and an order denying a continuance is seldom successfully attacked. [Citation.] [¶] Under this state law standard, discretion is abused only when the court exceeds the bounds of reason, all circumstances being considered. [Citations.]' [Citation.]" (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1181, disapproved on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) "The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. [Citation.] Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable

request for delay can render the right to defend with counsel an empty formality. [Citation.] There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. [Citations.]" (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589-590 [84 S.Ct. 841].)

b. *Procedural background.*

The parties' initial appearance on remand was apparently a hearing on March 15, 2013, before the Honorable Curtis B. Rappe, who had overseen the trial. Alonzo appeared with David Slater, the appointed counsel who had represented him at trial. At this time the matter was continued for one month. The minute order recording this continuance gives no indication who requested it or why it was granted. The Attorney General's brief on appeal seems to assert this first continuance was granted at Alonzo's request; while Alonzo's briefing implies otherwise, it does not directly dispute the Attorney General's characterization.[5]

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[5] In his opening brief, Alonzo states: "On March 15, 2013, appellant first appeared on the remittitur with his previously appointed defense counsel David Slater, and the matter was continued one month to April 12, 2013. On April 12, appellant again appeared with appointed counsel and requested a one-month continuance in order to hire an attorney for resentencing." The Attorney General's brief states, "[T]he trial court had already given appellant one 30-day continuance, and a second 14-day continuance, to prepare for a simple sentencing proceeding." In his reply brief, Alonzo does not dispute this characterization of the events.

On April 12, 2013, the parties' second appearance on remittitur, Slater asked for a one-month continuance because "[Alonzo's] family wants to try and hire an attorney for [re]sentencing." Asked what efforts had been made to hire new counsel, Slater said the family had spoken to a few attorneys: "[T]hey would be representing Mr. Alonzo for the resentencing and I think they're also speaking to an attorney for some federal appeals issues, a different attorney. I don't know the situation. I haven't really spoken with the family all that much." When the court remarked, "It's just here for resentencing under recent changes in the case law . . . ," Slater replied, "[M]aybe a new attorney will have some . . . new thoughts that I don't have. I don't know. I do know they wanted to try to hire a new attorney . . . ."

The prosecutor then said: "What I've said to Mr. Donahue [one of the potential new attorneys mentioned] . . . but, more importantly, [to] David Slater, his current attorney of record, the only thing the court could do in this case is the court could run it concurrent and maybe strike the gang allegation. That would reduce it to thirty-two to life. [¶] But I don't think legally anything more can be done in light of the charges that the jury found to be true so I've asked for a forty to life which is running . . . the four imposed sentences concurrent to one another. [¶] The gang allegation is strikeable.[6] That would essentially turn it . . . [to] thirty-two to life. [¶] I think . . . that's the most . . . the

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6 In *People v. Fuentes* (2016) 1 Cal.5th 218, 222, our Supreme Court held that trial courts have the power under section 1385 to dismiss a section 186.22 enhancement allegation for gang-related crimes, as well as the power to strike just the punishment for the enhancement in accordance with subdivision (g) of section 186.22.

court can do in light of the remittitur. [¶] So, in my opinion, it's either forty or thirty-two and the People are asking for forty."

When the trial court asked for clarification about the attorney the family was trying to hire, the following colloquy occurred:

"Mr. Slater: I know, they've spoken with Mr. Donahue . . . . I know the family has not hired him yet. And they're also speaking with another attorney . . . with the first name Nellie that they want to hire for the sentencing and I think Mr. Donahue would be here for the sentencing but –

"The Court: And how much time is that attorney going to then need?

"Mr. Slater: He really didn't say. [¶] Mr. Alonzo is asking the court for a month. That way he can file any paperwork he needs –

"The Court: Why is it going to take a month to hire a lawyer? [¶] You're either going to hire them or you're not.

"Mr. Slater: Well, if he needs to file a motion and [the prosecutor] has time to respond –

"The Court: Well, I'm [not] going to put it over for a month. He's not going to have a lawyer who is going to say I want more time and then get another lawyer. It's one thing for him to put it over to hire a lawyer and for that lawyer to come in and be prepared by a certain time.

"Mr. Slater: I understand.

"The Court: Because I've been in these situations before. The lawyer comes in. They want a whole transcript of the whole trial and dah, dah, dah, dah, dah. [¶] I mean, this is a very narrow issue. This isn't something where the lawyer is going to come in and file a new trial motion or file a collateral attack or

something like that. It's a very narrow issue. [¶] So I want you to make sure that the lawyer who comes in is going to be prepared to proceed on this in a reasonable time and brief it so –

"Mr. Slater: Well, I think if the court would give Mr. Alonzo a month and just no further continuances and if someone contacts me I'll just make sure they know there is going to be no further continuances.

"The Court: Well, what efforts have they made to hire a lawyer?

"Mr. Slater: Well, the family has told me that they're in the process of hiring a lawyer.

"The Court: What's that mean? [¶] When did they talk to the lawyer and . . . why hasn't the lawyer been hired yet and what needs to be done before the lawyer is either hired or not?

"Mr. Slater: . . . [T]hey said they're in the process of signing [a] . . . retainer agreement or the contract but it has not been completed yet.

"The Court: If they're that close I'll put it over two weeks and we'll see where we're at but I'm not going to relieve you at this point and I'm going to ask counsel to go on and brief this."

The trial court told both sides to be "ready to proceed and if a lawyer comes in he or she can tell me what they need . . . these things have a tendency to drag out, promises, promises, promises. [¶] If they're going to hire a lawyer . . . fine, but I'm not going to let a month go by and just be back in the same position. [¶] So I'll put it over two weeks and I want both of you to brief the issue." The court ended the hearing by saying: "So just tell the family that if new counsel is going to come in and say they're not going to be ready they better be prepared to tell me that they've been retained, how much time they need to be prepared on this

and why it's going to take that amount of time; okay?" The court directed both parties to "brief the [sentencing] issue."

On April 26, 2013, the People filed a sentencing memorandum. In describing Alonzo's original sentencing, the People's memorandum stated: "The court selected the only legal sentence for each count, 40 years to life, and then used its discretion to sentence Defendant consecutively as to all four counts for a grand total of 160 years to life. The appellate court returned the Defendant's matter to the trial court for resentencing in harmony with the new [case law] regarding the sentencing of juveniles for non-homicide cases." Noting the California Supreme Court's recent decision in *People v. Caballero* (2012) 55 Cal.4th 262, 268 (*Caballero*), the memorandum argued Alonzo should be sentenced concurrently on the four attempted murder convictions in order to "avoid violating the *Caballero* rule."

At the April 26 hearing, the trial court began by saying to defense attorney Slater:

"The Court: All right. What's the situation? [¶] I think I gave Mr. Alonzo this time to hire an attorney and I see you here. [¶] Has he hired an attorney?

"Mr. Slater: Your Honor, what the family told me is they . . . hired Patrick Aguirre but I haven't heard from him and they were paying him money supposedly and he won't come to court unless he had his complete retainer.

"The Court: So they haven't hired –

"Mr. Slater: Well, they've given him money. They have not hired him but they've been giving him money.

"The Court: Yeah. Well, that's different. You said hired. I'm just saying it's a contradiction of terms when you tell me that

he has not received all the money he needs and is not appearing. [¶] . . . [¶] . . . [Y]ou know, these things tend to just go on and on and on and . . . the court keeps preparing on this and I see no reason to continue it. [¶] So the family is still trying to raise the money? [¶] That's the situation?

"Mr. Slater: No. They've actually paid him money.

[¶] . . . [¶] [Slater apparently confers with Alonzo.]

"Mr. Slater: . . . [W]hat I understand [is] they actually paid him money but not enough.

"The Court: Yeah. That's what I'm saying. You know, he's not accepted the case so . . . that can go on forever. You know, I don't know how much he still needs, whether they are capable of getting that together, how long it would take if they could. I mean, it's completely speculative. And . . . you ask the court to just buy a pig in a poke and keep putting this over and over and over ad nauseam without any real indication it's going to happen. It doesn't merit a continuance so I'm going to deny the motion for continuance."

The trial court then proceeded to the resentencing. Defense counsel Slater acknowledged that, although he had received the prosecution's sentencing memorandum, he had not filed any sentencing recommendations on behalf of Alonzo, saying: "I didn't because . . . under the statutory minimums there is not much the court can do. Other than for me to ask for a [section]

1385 motion[7] and give Mr. Alonzo his original sentence there is not much more I could ask the court to do legally or statutorily except 1385." According to the parties, Slater's comment about a section 1385 motion asking the court to impose Alonzo's "original sentence" referred to the 20-year proposed plea bargain term that the trial court had refused to accept on the eve of Alonzo's trial.

The trial court denied defense counsel's section 1385 request and followed the prosecution's recommendation that Alonzo be resentenced to a total term of 40 years to life by running the sentences on his four premeditated attempted murder convictions concurrently, rather than consecutively.

c. *Discussion*.

Alonzo complains that, when the trial court denied him a one-month continuance on April 12, its comments "demonstrate (a) predominant concern with the court's own convenience and (b) a lack of appreciation for difficulties the average person faces in retaining legal representation." He asserts the court did not have "a legitimate, let alone [a] compelling reason" to deny him "a short continuance to secure attorney Aguirre."

The Attorney General argues "the trial court had already given appellant one 30-day continuance, and a second 14-day

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7 Section 1385, subdivision (a), provides, in pertinent part: "The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal shall be stated orally on the record." This includes the power to dismiss Three Strikes prior felony conviction allegations (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 527-528), as well as ordinary sentencing enhancement allegations (*People v. Thomas* (1992) 4 Cal.4th 206, 209-210).

continuance, to prepare for a simple sentencing proceeding. The trial court gave appellant a very clear and explicit warning on the occasion of his second continuance that it would not be inclined to grant further continuances based on some speculative attempt at fundraising for money to hire a new attorney." "The record makes it abundantly clear that trial defense counsel Mr. Slater had no idea whether the family would be able to secure enough money to retain Mr. Aguirre, or when that might actually happen. The trial court gave appellant every opportunity to hire privately-retained counsel, but appellant failed to provide any indication that he would be able to do so in a timely manner. The court was not required to keep giving appellant continuances indefinitely based on scant and vague assurances that he would eventually find the money to retain Mr. Aguirre."

We conclude Alonzo has failed to carry his burden of establishing that the trial court abused its discretion by " 'exceed[ing] the bounds of reason, all circumstances being considered.' " (*People v. Hajek and Vo*, *supra*, 58 Cal.4th at p. 1181.)

"The constitutional right to choice of counsel . . . is not absolute. One of the express limitations upon the right to choose one's own attorney is that the criminal defendant be 'financially able' to retain his counsel of choice. [Citations.]" (*United States v. Friedman* (D.C. Cir. 1988) 849 F.2d 1488, 1490, fn. omitted.) "A defendant's right to secure counsel of choice is cognizable only to the extent defendant can retain counsel with private funds. [Citation.]" (*United States v. Mendoza-Salgado* (10th Cir. 1992) 964 F.2d 993, 1014, fn. 12.) As our Supreme Court said in *People v. Courts* (1985) 37 Cal.3d 784: "Both this court and the United States Supreme Court have emphasized that trial courts have the

responsibility to protect a *financially able* individual's right to appear and defend with counsel of his own choosing." (*Id*. at p. 790, italics added.)

The trial court here had a legitimate question as to whether Alonzo or his family possessed the financial ability to retain new counsel. The information provided to the court appeared to indicate that Alonzo, or at least his family, had spoken to Patrick Aguirre and attempted to engage his services, but that a retainer agreement could not be finalized because of a lack of money. Alonzo failed to provide the trial court with an assurance his family would be able to raise the money that Aguirre – who never made an appearance, or contacted the trial court, or even communicated with Alonzo's current attorney – was apparently demanding. No member of Alonzo's family contacted the trial court or provided a written statement indicating when the financial arrangements would be completed. As a result, the trial court was justifiably concerned that (in the court's own words) it had been left entirely uncertain whether Alonzo's family was "capable of getting that together, how long it would take if they could. I mean, it's completely speculative."

It is well-recognized "that a defendant's right to choose a particular counsel must be weighed against administration-of-justice concerns." (*United States v. Neal* (1st Cir. 1994) 36 F.3d 1190, 1205-1206.) As our Supreme Court said in *Walker v. Superior Court* (1991) 53 Cal.3d 257, "[w]e have often recognized the 'inherent powers of the court . . . to insure the orderly administration of justice' " (*id*. at p. 266), and it cannot "be questioned that courts have inherent authority to control their own calendars and dockets" (*id*. at p. 267). "[T]he right to retain counsel of one's own choice is not absolute. The right 'cannot be

insisted upon in a manner that will obstruct an orderly procedure in courts of justice, and deprive such courts of the exercise of their inherent powers to control the same.' The public has a strong interest in the prompt, effective, and efficient administration of justice; the public's interest in the dispensation of justice that is not unreasonably delayed has great force." (*United States v. Burton* (D.C. Cir. 1978) 584 F.2d 485, 489, fns. omitted.)

The remittitur issued on February 6, 2013. The trial court granted an initial continuance on March 15, and did not deny any further continuances until April 26, almost six weeks later. Hence, there was a considerable period of time during which Alonzo and his family could have retained private counsel. Given the particular circumstances of this case, we cannot say the trial judge's denial of another continuance constituted an abuse of discretion.

2. *Alonzo's sentence did not violate the Eighth Amendment.*

Alonzo contends the 40-years-to-life term that he received upon resentencing violated the Eighth Amendment because he was a juvenile when he committed these nonhomicide crimes, and his sentence is the functional equivalent of life without possibility of parole (LWOP). This claim is meritless.

a. *Graham*, *Miller*, and *Caballero.*

Alonzo was 17 years old at the time of the shooting. In *Roper v. Simmons* (2005) 543 U.S. 551 [125 S.Ct. 1183], the court held that juveniles must be treated differently than adults when it comes to sentencing. "*Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments. [Citation.] As compared to adults, juveniles have a ' "lack of maturity and an underdeveloped sense of

responsibility" '; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.' [Citation.] These salient characteristics mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' [Citation.] Accordingly, 'juvenile offenders cannot with reliability be classified among the worst offenders.'. . ." (*Graham v. Florida* (2010) 560 U.S. 48, 68 [130 S.Ct. 2011, 2026] (*Graham*).)

For all of these reasons, *Roper* concluded that the imposition of capital punishment on juvenile offenders for any offense whatsoever violated the Eighth Amendment. Subsequently, *Graham* held the imposition of a life-without-possibility-of-parole (LWOP) sentence on a juvenile offender for a nonhomicide offense violated the Eighth Amendment. Two years later, *Miller v. Alabama* (2012) 132 S.Ct. 2455, 2469 (*Miller*) held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," although a court might, in its discretion, impose such a punishment.

In *People v. Caballero* (2012) 55 Cal.4th 262, 268 (*Caballero*), our Supreme Court concluded that, under the reasoning of these United States Supreme Court cases, "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." *Caballero* reasoned: "*Miller* . . . made it clear that *Graham*'s 'flat

ban' on life without parole sentences applies to all nonhomicide cases involving juvenile offenders, including the term-of-years sentence that amounts to the functional equivalent of a life without parole sentence imposed in this case. [¶] Defendant in the present matter will become parole eligible over 100 years from now. (§ 3046, subd. (b) [requiring defendant to serve a minimum of 110 years before becoming parole eligible].) Consequently, he would have no opportunity to 'demonstrate growth and maturity' to try to secure his release, in contravention of *Graham*'s dictate. [Citations.] *Graham*'s analysis does not focus on the precise sentence meted out. Instead, as noted above, it holds that a state must provide a juvenile offender 'with some realistic opportunity to obtain release' from prison during his or her expected lifetime. [Citation.]" (*Id*. at pp. 267-268, fn. omitted.)

b. *People v. Franklin.*

Effective January 1, 2014, the Legislature passed Senate Bill No. 260, which added sections 3051, 3046, subdivision (c), and 4801, subdivision (c) to the Penal Code. As relevant here, section 3051, subdivision (a)(1), provides: "A youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was under 23 years of age at the time of his or her controlling offense." Subdivision (b)(3) provides: "A person who was convicted of a controlling offense that was committed before the person had attained 23 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless

previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions."

In recent years, a number of cases had raised the question of whether an extremely long indeterminate sentence might constitute the functional equivalent of an LWOP term, and thereby violate Eighth Amendment rules for juvenile sentencing. Our Supreme Court resolved this question earlier this year in *Franklin*, *supra*, 63 Cal.4th 261, concluding that Senate Bill No. 260—which the Legislature passed "explicitly to bring juvenile sentencing into conformity with *Graham*, *Miller*, and *Caballero*" (*Franklin*, at p. 277)—mooted any infirmity in a juvenile offender's lengthy indeterminate sentence. The court explained:

"At the heart of Senate Bill No. 260 was the addition of section 3051, which requires the Board to conduct a 'youth offender parole hearing' during the 15th, 20th, or 25th year of a juvenile offender's incarceration. (§ 3051, subd. (b).) The date of the hearing depends on the offender's ' "[c]ontrolling offense," ' which is defined as 'the offense or enhancement for which any sentencing court imposed the longest term of imprisonment.' (*Id*., subd. (a)(2)(B).) A juvenile offender whose controlling offense carries a term of 25 years to life or greater is 'eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.' . . .

"Section 3051 thus reflects the Legislature's judgment that 25 years is the maximum amount of time that a juvenile offender may serve before becoming eligible for parole. Apart from the categories of offenders expressly excluded by the statute, section

3051 provides all juvenile offenders with a parole hearing during or before their 25th year of incarceration. The statute establishes what is, in the Legislature's view, the appropriate time to determine whether a juvenile offender has 'rehabilitated and gained maturity' (Stats. 2013, ch. 312, § 1) so that he or she may have 'a meaningful opportunity to obtain release' (§ 3051, subd. (e)).

"Sections 3051 and 3046 have thus superseded the statutorily mandated sentences of inmates who . . . committed their controlling offense before the age of 18. The statutory text makes clear that the Legislature intended youth offender parole hearings to apply retrospectively, that is, to all eligible youth offenders regardless of the date of conviction. . . .

"The Legislature did not envision that the original sentences of eligible youth offenders would be vacated and that new sentences would be imposed to reflect parole eligibility during the 15th, 20th, or 25th year of incarceration. The continued operation of the original sentence is evident from the fact that an inmate remains bound by that sentence, with no eligibility for a youth offender parole hearing, if 'subsequent to attaining 23 years of age' the inmate 'commits an additional crime for which malice aforethought is a necessary element . . . or for which the individual is sentenced to life in prison.' (§ 3051, subd. (h); Stats. 2015, ch. 471.) But section 3051 has changed the manner in which the juvenile offender's original sentence operates by capping the number of years that he or she may be imprisoned before becoming eligible for release on parole. The Legislature has effected this change by operation of law, with no additional resentencing procedure required. [Citation.]" (*Franklin*, *supra*, 63 Cal.4th at pp. 277-279.)

"In sum, the combined operation of section 3051, section 3046, subdivision (c), and section 4801 means that [defendant] is now serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration. Such a sentence is neither LWOP nor its functional equivalent. Because [defendant] is not serving an LWOP sentence or its functional equivalent, no *Miller* claim arises here. The Legislature's enactment of Senate Bill No. 260 has rendered moot [defendant's] challenge to his original sentence under *Miller*." (*Franklin*, *supra*, 63 Cal.4th at pp. 279-280.)

The court noted, however, that although Franklin's Eighth Amendment claim had been rendered moot by section 3051, a new issue had been created relating to this future parole eligibility hearing: "Senate Bill No. 260 directs the administrative entity that will determine if and when Franklin is released to 'give great weight' (§ 4801, subd. (c))[8] to the salient characteristics of youth outlined in *Miller, Graham*, and *Caballero*. Franklin argues that the Board will not be able to give great weight to these characteristics at a youth offender parole hearing because 'there would be no reliable way to measure his cognitive abilities, maturity, and other youth factors

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8 Section 4801, subdivision (c), provides: "When a prisoner committed his or her controlling offense, as defined in subdivision (a) of Section 3051, prior to attaining 23 years of age, the board, in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, *shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law*." (Italics added.)

when the offense was committed 25 years prior.' [¶] Franklin notes that his own sentencing proceeding resulted in a record that may be incomplete or missing mitigation information because the trial court deemed such information irrelevant to its pronouncement of his mandatory sentence. Franklin was sentenced in 2011, before the high court's decision in *Miller* and before our Legislature's enactment of Senate Bill No. 260 in response to *Miller*, *Graham*, and *Caballero*." (*Franklin*, *supra*, 63 Cal.4th at p. 282.)

In light of these circumstances, *Franklin* concluded that the proper remedy was a limited remand to determine only whether Franklin had been given an adequate opportunity to make the record necessary for a fair decision at the youthful offender parole hearing in 25 years: "In directing the Board to 'give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner' (§ 4801, subd. (c)), the statutes also contemplate that information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration. For example, section 3051, subdivision (f)(2) provides that '[f]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime . . . may submit statements for review by the board.' Assembling such statements 'about the individual before the crime' is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or

community members may have relocated or passed away. [Citation.] In addition, section 3051, subdivision (f)(1) provides that any 'psychological evaluations and risk assessment instruments' used by the Board in assessing growth and maturity 'shall take into consideration . . . any subsequent growth and increased maturity of the individual.' Consideration of 'subsequent growth and increased maturity' implies the availability of information about the offender when he was a juvenile.

"It is not clear whether Franklin had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing. Thus, although Franklin need not be resentenced . . . we remand the matter to the trial court for a determination of whether Franklin was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing.

"If the trial court determines that Franklin did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence. Franklin may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and

circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law' [citation]." (*Franklin*, *supra*, 63 Cal.4th at pp. 283-284.)

c. *Discussion*.

In *Alonzo I*, we concluded Alonzo's sentence of 160 years to life was unconstitutional under *Caballero* because it was the functional equivalent of a life-without-possibility-of-parole term for a juvenile in a nonhomicide case. Therefore, we vacated his sentence and remanded to the trial court for resentencing. At resentencing, the trial court sentenced Alonzo on the four counts of attempted murder concurrently, rather than consecutively. As a result, Alonzo's sentence is now 40 years to life.

In his current appeal, Alonzo contends the 40-years-to-life prison term violates the Eighth Amendment because it amounts to the functional equivalent of life without possibility of parole. He argues that, in practical terms – given his age at the time of sentencing – his 40-years-to-life term means that he would have to serve "in excess of 36 years in state prison, making him 55 years old prior to being merely *eligible for consideration* for parole."

We believe that the reasoning of *Franklin* has effectively rendered Alonzo's Eighth Amendment claim moot. Alonzo's term of 40 years to life consists of a mandatory portion and a discretionary portion. The mandatory portion is 32 years to life and consists of a life term for a single count of premeditated attempted murder (which carries a minimum parole eligibility term of seven years pursuant to section 3046), followed by a

mandatory consecutive term of 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)). To this mandatory term, the trial court used its discretion to add eight more years before Alonzo would be parole eligible under the gang enhancement statute (§ 186.22, subd. (b)(5)).[9]

Franklin stated: "Our mootness holding is limited to circumstances where, as here, section 3051 entitles an inmate to a youth offender parole hearing *against the backdrop of an otherwise lengthy mandatory sentence*. We express no view on *Miller* claims by juvenile offenders who are . . . serving lengthy sentences imposed under discretionary rather than mandatory sentencing statutes." (*Franklin*, *supra*, 63 Cal.4th at p. 280, italics added.) The mandatory portion of Alonzo's sentence is 32 years to life, which appears to us to constitute "an otherwise lengthy mandatory sentence." The new legislative regime guarantees Alonzo a parole hearing after 25 years of incarceration. (See § 3051, subd. (b)(3) ["A person who was convicted of a controlling offense that was committed before the person had attained 23 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole

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[9] Premeditated attempted murder carries a life sentence, with a minimum parole-eligibility term of seven years unless some other provision establishes a greater minimum term. (See § 3046, subd. (a) ["An inmate imprisoned under a life sentence shall not be paroled until he or she has served the greater of the following: [¶] (1) A term of at least seven calendar years. [¶] (2) A term as established pursuant to any other law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole." The gang enhancement statute extends that seven-year minimum parole eligibility term to 15 years. (§ 186.22, subd. (b)(5).)

by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions."].)

Hence, although Alonzo's 32-years-to-life mandatory sentence is not as long as Franklin's 50-years-to-life mandatory sentence, both terms can be reasonably characterized as "lengthy" mandatory terms and, therefore, we conclude *Franklin*'s logic applies here and renders moot Alonzo's contention that his sentence violates the Eighth Amendment.

3. *Alonzo was not denied effective assistance of counsel at the resentencing hearing.*

Alonzo contends he was denied effective assistance of counsel at the resentencing hearing because his attorney failed to effectively advocate for a lower term. There is no merit to this claim.

a. *Legal principles.*

"We explained in *Strickland* [*v. Washington* (1984) 466 U.S. 668 [104 S.Ct. 2052] (*Strickland*)] that a violation of [the Sixth Amendment right to effective assistance of counsel] has two components: [¶] 'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Citation.] [¶] To establish ineffectiveness, a 'defendant must show that counsel's representation fell below an objective standard of

reasonableness.' [Citation.] To establish prejudice he 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*Williams v. Taylor* (2000) 529 U.S. 362, 390-391 [120 S.Ct. 1495].)

"In determining whether counsel's performance was deficient, a court must in general exercise deferential scrutiny" in order to avoid "the adverse consequences that systematic 'second-guessing' might have on the quality of legal representation provided to criminal defendants and on the functioning of the criminal justice system itself." (*People v. Ledesma* (1987) 43 Cal.3d 171, 216.) "We cautioned in *Strickland* that a court must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight. [Citation.]" (*Bell v. Cone* (2002) 535 U.S. 685, 702 [122 S.Ct. 1843], italics added.)

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697.)

b. *Discussion.*

It appears that Alonzo's attorney could have done more in advocating for a reduced sentence. Defense counsel failed to provide the sentencing memorandum that the trial court had

requested from both parties, even though the prosecution had submitted one. Defense counsel did not remind the trial court of its authority to dismiss the gang enhancement in the interest of justice, which could have reduced the sentence to a term of 32 years to life.[10] Nor did defense counsel remind the trial court of the mitigating factors he had argued during Alonzo's original sentencing hearing in 2009.[11]

However, we need not reach *Strickland*'s deficiency prong because it is clear to us that Alonzo cannot make out the prejudice prong. There is nothing in the record indicating the trial court believed that it lacked the authority to strike the gang enhancement.[12] The only reason for the remand, as the trial

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[10] Section 186.22, subdivision (g), provides: "Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition."

[11] According to the Attorney General, defense counsel at the 2009 sentencing hearing told the trial court that " 'prior to this case, [Alonzo] had no real convictions, no prior record, no history. He did have some arrests, but there were no petition[s] or complaint[s] filed. He was young at the time of his arrest. He was 17-years-old, and he has a child . . . .' "

[12] The prosecutor told the trial court during the April 12 hearing that it could strike the gang enhancement, which would result in a term of 32 years to life. The prosecutor repeated this several times. Although the prosecution's subsequent memorandum ignored this sentencing authority (and described

court expressly acknowledged, had been to reconsider Alonzo's sentence in light of the new case law governing juvenile sentencing. Most significantly, the trial court reduced Alonzo's sentence from a 160-years-to-life term down to a 40-years-to-life term, a very substantial reduction. Alonzo has not shown " 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " (*Williams v. Taylor*, *supra*, 529 U.S. at p. 391.) Moreover, given the enactment of Senate Bill 260, Alonzo is now guaranteed a parole hearing in 25 years, which – as we have explained – is 15 years *less* than the minimum parole eligibility term dictated by Alonzo's sentence.

Alonzo argues we should revise standard ineffective assistance of counsel jurisprudence by doing away with *Strickland*'s prejudice prong and announcing that incompetency of counsel is reversible per se. He asserts "the *Strickland* standard erroneously imported reliability concerns relevant to violation of the Due Process Clause of the Fourteenth Amendment into evaluation of the deprivation of what is recognized as a Sixth Amendment right. It is time for the courts to take a fresh look at the 'reasonable probability' prejudice prong of the *Strickland* standard." We decline this novel invitation to alter the standard ineffective assistance of counsel analysis in light of *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction."]).

Alonzo's original 40-years-to-life term as "the only legal sentence"), only two weeks had gone by between the April 12 hearing and Alonzo's resentencing on April 26.

Hence, we reject Alonzo's claim that he was denied the effective assistance of counsel at the resentencing hearing. However, given the very recent change in law brought about by *Franklin*, we have determined the proper course is to remand this matter back to the sentencing court for the limited purpose of determining whether Alonzo "was afforded sufficient opportunity to make a record of information relevant to his eventual youthful offender parole hearing." (*Franklin*, *supra*, 63 Cal.4th at p. 284.) If he was not, the parties should be given the opportunity to make such a record.

DISPOSITION

The judgment is affirmed and remanded with directions to the trial court to determine whether Alonzo was given an adequate opportunity to make a sufficient record of his juvenile characteristics and circumstances at the time of his offense as set forth in *Franklin*. If the trial court finds he was not, then both parties shall be given the opportunity to make such a record.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

ALDRICH, J.

LAVIN, J.